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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1474

FERMONT DIVISION
Dynamics Corporation of America

Petitioner

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes, Regulations, and Proposed Court Rules Involved	4
Statement of the Case	9
Reasons for Granting The Writ	15
Conclusion	23
Appendix A-Order of the Court Claims	A-1
Appendix B-Decision of the Armed Services Board of Contract Appeals	B-1

CASES:

Interstate Commerce Commission v. Louisville & Nashville R.R. Co., 227 U.S. 88(1913)	23
Morelle v. United States, 177 Ct. Cl. 848(1966)	17
S&E Contractors, Inc., v. United States, 406 U.S. 1(1972)	16

	Page
United States v. Anthony Grace & Sons Inc., 384 U.S. 424(1966)	2,18,19
United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709(1963)	2,18,19
United States v. Utah Construction and Mining Co., 384 U.S. 394(1966)	2,18,19
Volentine & Littleton v. United States, 136 Ct. Cl. 638, 145 F. Supp. 952(1954)	17
Constitutional Provisions:	
United States Constitution, Amend V	3,4
Statutes	
28 U.S.C. Sec. 1255	2,4
28 U.S.C. Sec. 1491	5,14
28 U.S.C. Sec. 2101	4
41 U.S.C. Sec. 321	5,
41 U.S.C. Sec. 322	5,14
Regulations	
32 CFR Sec. 7.103	6,16
32 CFR Sec. 7.103-12	6,16

	Page
Proposed Federal Rule of Evidence for United States Courts and Magistrates	
Rule 106	8,22
Texts	
Report of the Commission on Government Procurement, Vol. 4, (Wash. D.C., 1972)	20

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

FERMONT DIVISION,
DYNAMICS CORPORATION
OF AMERICA,

Petitioner

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF CLAIMS

A writ of certiorari is respectfully sought to review the final order of the United States Court of Claims entered in this proceeding on January 4, 1974 which upheld the decision of the Armed Services Board of Contract Appeals dated August 5, 1971.

OPINIONS BELOW

The order of the Court of Claims (Appendix A, infra. pp. A-1 to A-3) has not been reported. The decision of the Armed Services Board of Contract Appeals (Appendix B, infra, pp. B-1 to B-31) is reported at 71-2 BCA 41,915. (Board of Contract Appeals Decisions, Commerce Clearing House, Chicago, Illinois).

JURISDICTION

The order of the United States Court of Claims granting the cross-motion of the United States for summary judgment and denying petitioners motion for summary judgment was entered on January 4, 1974 (Appendix A, infra, pp. A-1 to A-3). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the decisions of this Court in United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709 (1963); United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966); and United States v. Anthony Grace & Sons, Inc., 384 U.S.

424 (1966) had the effect of rendering administrative boards of contract appeals as courts of original jurisdiction?

2. Assuming question No. 1 is answered in the affirmative; whether the rules of substantive and procedural Due Process related to the admission of and decisional utilization of evidence binding on courts of original jurisdiction are binding upon the administrative boards of contract appeals?

3. Whether evidence admitted by the Armed Services Board of Contract Appeals over petitioner's objection, which was admitted upon a limited basis subject to connection, which connection the Board found was not proven, could form a material premise of the Board's decision adverse to petitioner?

4. Whether petitioner was thereby denied Due Process of law under U. S. Constitution, amend. V?

5. Whether the Court of Claims erred in failing to address and dispose of this issue of denial of Due Process?

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND PROPOSED COURT RULES INVOLVED

The Fifth Amendment of the Constitution of the United States provides in pertinent part as follows:

> "nor [shall any person] be deprived of ... property, without due process of law..."

The statute describing the right of petitioner to apply for a writ of certiorari to this court, 28 U.S.C., Sec. 1255, reads in pertinent part as follows:

> "Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant";

The statute describing the time within which an application for writ of certiorari must be sought, 28 U.S.C. Sec. 2101(c), provides in pertinent part as follows:

> "any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree."

The statute which sets forth the jurisdiction of the Court of Claims in matters of contracts with the United States, 28 U.S.C. Sec. 1491, provides in pertinent part as follows:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded...upon any express or implied contract with the United States..."

The statute which sets forth the finality to be accorded decisions of administrative Boards of Contract Appeals, 41 U.S.C. Sec. 321 and 322, provides in pertinent part as follows:

> Sec. 321 "...That any such decision shall be final and conclusive unless the same is fradulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> Sec. 322 "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

The contracts at bar were required to contain a disputes clause (32CFR Sec. 7.103-12(a) infra.) under the provisions of the Armed Services Procurement Regulations (32 CFR Sec. 7.103) which provides:

> "The following clauses shall be inserted in all fixed price supply contracts:"

The mandatory disputes clause, 32 CFR Sec. 7.103-12(a), set forth in the Armed Services Procurement Regulations provides in pertinent part:

DISPUTES (1958 JAN)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer...The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to

offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

The Proposed Federal Rules of Evidence for United States Courts and Magistrates, Rule 106, describes the use of evidence admitted for a limited purpose as follows:

"When evidence which is admissible as to one party or for one purpose but not admissable as

to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

STATEMENT OF THE CASE

Petitioner and the United States through its Department of the Air Force entered into two express contracts whereby the petitioner was to manufacture and sell certain engine generator sets. The engine generator sets were to be manufactured and delivered in compliance with certain specifications furnished by the United States. A dispute arose as to whether those specifications required petitioner to furnish electrolyte along with the sets for use in the storage batteries with which the engine was started. The Contracting Officer determined that such a requirement did exist and directed electrolyte be furnished.

As required by the contract, petitioner complied with the direction while appealing its propriety to the Armed Services Board of Contract Appeals, also as required by the mandatory Disputes Clause in the contract.

In support of its position at the hearing the United States offered proof concerning the events and circumstances surrounding the furnishing of electrolyte upon previous contracts for engine generator sets of similar type. The pleadings of the United States gave no notice that reliance upon such extraneous prior contracts would be made. Petitioner objected to the admission of such evidence upon the ground that no foundation had been made to establish either its relevance or its binding effect upon the petitioner.

The United States made an offer of proof subject to connection that the evidence was being offered to and would establish a uniform custom and usage of the engine generator set industry and was, therefore, relevant to and binding upon petitioner as a member of that industry.

The Board admitted the evidence over petitioner's objection upon that basis.

The evidence once admitted established the contrary of a uniform custom and usage. It established, instead, that upon some contracts electrolyte was to be furnished and upon others, it was not. The Board in its decision (Appendix B, infra., pp. B-13 to B-14) found that the evidence offered subject to connection received over objection not only failed to prove custom and usage but, indeed disproved the existence of such custom and usage.

Part of the evidence so introduced related to events surrounding the modification of the specifications on a prior solicitation, in particular with respect to the requirement for furnishing electrolyte. By that specific modification the United States in that instance clearly stated that it desired electrolyte to be furnished. When that same specification was issued on the present contract the express language of the prior solicitation amendment was not included. Petitioner had been an unsuccessful bidder upon the prior

solicitation. In the course of the amendment of that solicitation petitioner's president had signed an acknowledgment that petitioner had received the amendment.

In its decision the Board found that the limited basis upon which the evidence had been admitted over objection, i.e. as probative of a custom and usage, had not been established. Nonetheless the Board proceeded to utilize the portion of that evidence related to the history of the modification and the prior solicitation as being relevant to an entirely new issue introduced for the first time by the Board itself in its decision. A basic issue in the case was whether the specifications were ambiguous with regard to the requirement to furnish electrolyte and, if so, whether such ambiguity was latent or patent in nature. That was a dispositive issue since liability for latent ambiguities is upon the United States whereas liability with regard to patent ambiguities is upon the contractor. The Board, while suggesting that ordinarily it would have held the specifi-

cations to be latently ambiguous, held them to be patently ambiguous as to this petitioner. The basis for that holding was knowledge of the corporate petitioner which the Board attributed to it from the fact that its President had signed the acknowledgment of the special modification of the specification with regard to electrolyte which had been made on a prior procurement. That knowledge, the Board held, was sufficient to have placed the petitioner upon notice that, even though the special modification was not contained in the specification as issued under petitioner's contract, the requirement for electrolyte may nonetheless have been intended to be imposed by the United States. Thus construed as a patent ambiguity the Board resolved the matter adversely to petitioner.

The decision of the Board after the trial, as noted, introduced an entirely new issue of agency and entity. The determination of that issue, in turn, formed the gravamen of the rationals by which the Board rendered

its decision adverse to petitioner. No opportunity was thereby afforded to petitioner to meet this new issue and to present relevant evidence and testimony concerning it and material to its proper determination.

Petitioner sought review of that denial of Due Process of law as well as of other errors committed by the Board in the United States Court of Claims under the provisions of Title 41 U.S.C. Sec. 322 (Wunderlich Act) and 28 U.S.C. Sec. 1491.

Petitioner's remedy in the Court of Claims was limited to a motion for summary judgment raising only questions of law upon which the Board's decision was based. Even so, such limited review should have been sufficient to have obtained a judgment that the decision of the Board was based in material part upon a violation of petitioner's rights to procedural Due Process and, therefore, would not be permitted to stand.

The Court of Claims issued a 2 page decision. (Appendix A, infra). It totally failed to address that constitutionally vital

issue in any degree. Indeed, inferentially, the Court appeared to itself approve of the misuse of evidence that should not have been in the record at least not without having afforded to petitioner the opportunity to meet it in the context of the entirely new issue for which it was now being used. Certiorari is sought.

REASONS FOR GRANTING THE WRIT

The reasons why the granting of this writ is imperative lie partly in the history of administrative self-regulation through quasi-judical administrative appeals procedures and partly in the impact which the recent decisions of this Court have had upon that historical background.

Unlike private litigants, contractors with the United States do not have direct access to the law courts. Such access as they do have is limited to what is essentially an appellate type review. It is a mandatory requirement that prime contractors with the United States contractually agree to submit their disputes to the trial and determination of administrative

boards of contract appeals (32CFR Secs. 7.103 and 7.103-12), in this instance, to the Armed Services Board of Contract Appeals. This Court in S&E Contractors, Inc. v. United States, 406 U.S.1(1972) held that such administrative appeals boards have the status of an entity of the agency with which the contractor is engaged in dispute. Consequently it denied the right of the agency to appeal from what were, in effect, its own decisions adverse to itself. On the other hand, a situation in which one's adversary is also, upon another level, the objective determinator of the controvesy is a concept unique to the American system of jurisprudence. It is not meant to suggest that because it is unique it is improper. Administrative self-regulation is a proper objective. In a complex society such as ours it is a necessary objective. It is submitted, however, that the uniqueness of the principle requires that its application be closely monitored for and guided by the strictest adherence to the preservation of fundamental constitutional rights of litigants to procedural and substantive Due Process of Law.

Historically it was recognized that the attainment of overall beneficial administrative objectives might require a greater degree of flexibility and informality in the administrative appeals proceedings than would prevail were such matters being litigated before the law courts. For example, it is generally recognized that hearsay evidence may be received in such administrative appeals proceedings although such evidence would be barred in the law courts. See e.g. Morelle v. U. S., 177 Ct. Cl. 848(1966). The United States Court of Claims as the law court statutorily authorized to review the decisions of the administrative boards recognized that, upon occasion, the principles of flexibility and informality prevailing in board proceedings conflicted with the fundamental principles of Due Process. C. F. Volentine & Littleton v. United States, 136 Ct. Cl. 638, 145 F. Supp. 952 (1954). Upon such occassions the Court of Claims had available to it the only appropriate remedy; a trial de novo under its judicial rules and procedures.

In 1963 this Court decided the case of United States v. Carlo Bianchi & Co. 373 U.S. 709 (1963). It held that the findings of fact of the administrative boards were binding upon the Court of Claims with certain quite restricted limitations. It held, consequently, that the practice of the granting of de novo trials to correct administrative failures to adhere to principles of Due Process in their trial and deliberative proceedings was no longer permissable. In United States v. Utah Construction and Mining Co., 384 U.S. 394(1966) and United States v. Anthony Grace & Sons, Inc., 384 U.S. 424(1966) the Court in substance concluded de novo trials would no longer be permitted by the Court of Claims where an administrative hearing has been held.

The impact of those decisions upon the history and status of the administrative appeals board was enormous. In effect they were catapulted into the status of law courts of original jurisdiction in that the standards of appellate review of their decisions was limited to those prevailing with respect to the appellate review of

the decisions of the law courts. Patterns of informality of procedures, rules and proceedings formed over the years now demanded in depth re-examination by the administrative entities in the absence of the former procedure whereby too much flexibility and informality would find its remedy in a de novo trial before the Court of Claims. It now becomes imperative that a consciousness of the principles of Due Process pervade the procedures and processes of the administrative boards from the earliest point of inception of the litigation and be maintained throughout the pre-trial, trial and deliberative processes.

Whether the full evidential and other formalities of the law courts of original jurisdiction need now be adopted in toto by the administrative boards or whether some vestiges of prior informality in such matters remained appropriate was a vital question left unanswered by this Court in United States v. Carlo Bianchi & Co. supra., United States v. Utah Construction and Mining Co., supra and United States v. Anthony Grace & Sons,

Inc., supra. Guidance upon this vital area is urgently required. Certain elements of that guidance may appropriately lie in the purview of the Congress. See Report of the Commission on Government Procurement, Vol. 4, Part G, ch. 2 (Wash. D.C. 1972). The guidance needed with respect to the issue presented here, however, is peculiarly within the province and expertise of this Court.

Important legislation designed to protect, extend and preserve the rights of citizens to equality of opportunity in a host of areas have been implemented through the aegis of mandatory terms and provisions inserted into contracts between the United States and members of American industry. As such these vital matters become potentially areas of dispute which shall be resolved by the administrative appeals boards. Far more is involved in ensuring that such boards adhere to strict standards of Due Process than mere pecuniary loss or gain. The most fundamental rights of large segments of our population may ultimately be brought before such boards for determination with the deepest and most pervading effect.

It is not only appropriate but essential that this Court clearly establish and carefully define the standards by which such administrative boards shall deal with and determine matters of such great material significance.

Due Process is not a severable concept. If it is to be preserved at all, it must be protected in each and every instance in which its possible violation appears.

There is little doubt that Due Process was violated here. The Boards sit as finders of the facts much as do juries in the law courts. Certainly it is appropriate to consider the greater expertise of the Boards in dealing with the weight, credibility and other aspects of evidence. However, those errors which the rules of evidence are designed to prevent juries from innocently committing are no less forbidden to expert triers of the facts. Such expert triers of the fact are obligated to, in effect, voluntarily impose upon themselves in their deliberative processes the same standards as would be imposed upon jurors under instructions of the Court in the law courts.

The Proposed Federal Rules of Evidence reflect and codify the treatment which is to be accorded to evidence admitted for a limited purpose. Proposed Rule 106 would provide in pertinent part:

> "When evidence which is admissable... for one purpose but not admissable... for another purpose is admitted, the judge ...shall restrict the evidence to its proper scope and instruct the jury accordingly."

In the case at bar, petitioner, satisfied, as was the Board itself ultimately, that the evidence offered and received solely to prove custom and usage did not do so, had the right to expect that the evidence would be limited to that purpose and entirely excluded when it was determined that such limited purpose of the admission of the evidence had not been established. Instead it was faced in the Board's decision with that evidence utilized for an entirely different purpose related to entirely new

issues of agency and imputed knowledge which had not theretofore been raised. Such utilization of the evidence not only totally surprised petitioner but did so under circumstances in which it had been effectively prevented from offering rebuttal evidence and otherwise objecting to and testing the evidence in the context of a new offer of proof against a new set of issues and ultimate possible dispositive conclusions of law.

CONCLUSION

Under these circumstances, this court itself has stated the reasons why the writ sought herein should and must be granted. In Interstate Commerce Commission v. Louisville & Nashville R.R. Co., 227 U.S. 88 at 93 (1913) this Court held:

> But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by

which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

Respectfully submitted,

Robert D. Witte
Counsel for Petitioner

APPENDIX A

ORDER OF THE UNITED STATES COURT OF CLAIMS

IN THE UNITED STATES COURT
OF CLAIMS

No. 210-72

FERMONT DIVISION,
DYNAMICS CORPORATION OF AMERICA

v.

THE UNITED STATES

Before NICHOLS, Judge, Presiding,
KASHIWA and BENNETT, Judges.

ORDER

This case is before the court for review under the standards of the Wunderlich Act, 41 U.S.C. 322, having been submitted to the court directly under Rule 166(b) on the parties' cross-motions for summary judgment and the briefs and oral argument of counsel. Plaintiff contends that a decision of the Armed Services Board of Contract Appeals, Fermont Division, Dynamics Corporation of America, par. 9022, 71-2 BCA 41, 915, is erroneous as a matter of law. Upon consideration thereof, we conclude that the

decision below is correct and we adopt the same as the basis for our decision. Plaintiff contracted to furnish diesel generators. Incorporated specifications for batteries provided that electrolyte (battery acid) was not required. Engine specifications called for electrolyte unless otherwise specified. There was a history of previous procurement, of which plaintiff should have been aware, reflecting confusion as to electrolyte, that called for administrative corrections. Defendant's contracting officer insisted that electrolyte be furnished. Plaintiff asked for an equitable adjustment as for an extra. The Board held that the contract and specifications were, taken as a whole, ambiguous, but that the ambiguity was patent. It was not reasonable for plaintiff to rely on its interpretation without inquiry. The Board correctly cites, among other cases, Jameson, Inc. v. United States, 194 Ct. Cl. 819, 442 F.2d 930 (1971).

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, that defendant's

like cross-motion is granted and that plaintiff's petition is dismissed.

BY THE COURT

JAN 4 1974

Philip Nichols, Jr.
Judge, Presiding

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	ASBCA
Fermont Division,	)	Nos.
Dynamics Corporation of America	)	14328,
	)	14416
Under Contracts Nos.	)	
F04606-68-D-0575 and	)	
F04606-67-D-0321		

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Trial Attorney

OPINION BY MR. SOBERNHEIM

Appellant, under two contracts with the Government for the delivery of diesel generators, was ordered to furnish with each unit a separately-packaged quantity of a battery liquid, called electrolyte. Appellant considered this requirement as extra and asked for an equitable adjust-

ment in contract price. The contracting officer, taking the contrary view, denied the claim and these appeals followed. The parties have agreed to a remand to the contracting officer for determination of the amount due, if appellant is found entitled to recover.

STATEMENT OF FACTS

1. Contract No. F04606-67-D-0321 (ASBCA No. 14416)

Contract No. 0321 was awarded to appellant by the Government, represented by the contracting officer of the Sacramento Air Materiel Area (SMAMA), as of 1 September 1966. It resulted from SMAMA's initial procurement under the two-step advertising procedure of 400 cycle diesel generator sets for general purpose use and support of communication, electronic and radar equipment (Tr. 18; R4 doc. A(1)), designated as EMU-19/E through -24/E and -27/E (Spec MIL-G-38441 (USAF), par. 1.1, R4 doc. A(4)). The contract provided for delivery of a minimum of 10 and a maximum of 900 EMU generators of classes 20/E through 24/E as ordered by the Government in indefinite quantities during the contract period (Contr. Sched. Parts XV, XVI, XVII, R4 doc. A(1)).

The manufacture of the EMU diesel generators was governed under Contract No. 0321 by technical exhibit SMNRT 65-8 and by specification MIL-G-28441. The technical exhibit covered primarily the requirements for Phase I and Phase II testing (SMNRT 65-8, par. 21., R4 doc. A(1)) and did not at any point refer to electrolyte. The manufacturing specification MIL-G-38441 (R4 doc. A(4)) referred to electrolyte only in Section 5, "Preparation for Delivery." That section provided for preservation and packaging at level A, B or C, as specified in the ordering document (see id., sec. 6.2), and prescribed the following packaging details:

> "5.4.1.1.1 Electrolyte. Electrolyte shall be packaged and packed for overseas shipment in separate shipping containers in accordance with MIL-S-207."
>
> "5.4.1.1.3 Batteries and battery cables. Batteries shall be furnished dry. Battery cables shall be disconnected from the batteries and preserved and wrapped as required in MIL-E-10062."

Further details as to packaging and packing were set forth in Attachment No. 1 to Air Force Logistics Command (AFLC) Form No. 872, also incorporated into Contract No. 0321. However, it con-

tained no reference to electrolyte.

About two years after contract award and before any deliveries thereunder were made, the contract was amended by P013, dated 9 October 1969 (R4 doc. A(2)) which substituted a 1967 version of Attachment No. 1 for that originally in the contract. This new version of Attachment No. 1 expressly referred both to the packaging (pars. 2.3.20 and 2.3.3; see also par. 2.3.2) and packing (pars. 2.4.1.2, 2.4. 2b; see also par. 2.4.3) of electrolyte. 1/ These provisions indicate that electrolyte is shipped in polyethelene bottles, packed in exterior fiberboard cartons. The detail of these provisions is not, however, relevant to these appeals.

Related to the packaging provisions of the contract was General Provision (GP) 58, which specified safety precautions for dangerous materials, defined as including acids, and listed numerous manuals, technical orders, specifications and other laws or governmental regulations to be followed insofar as applicable or affecting performance of the contract. The

---

1/ These provisions correspond substantially to those included from the start in Contract No. 0575. They are there Attachment No. 1, pars. 1.1.16, 1.2.1.3, 1.2.2.1b; see also par. 1.2. 3.1.

parties have not, however, pointed to specific referenced provisions which affected appellant's performance or related to the interpretation problem regarding appellant's alleged obligation to furnish electrolyte.

In addition, specification MIL-G-38441 in section 2, entitled "Applicable Documents," referred appellant to two additional specifications in which electrolyte was mentioned: MIL-B-11188, dealing with lead acid storage batteries, and MIL-E-11276, the general specification for industrial medium and high speed diesel engines. The latter specification was referred to in the engine section (sec. 3.7) which in relevant part read as follows:

> "The engine for the 15-, 30-, 60-, 100-, and 150-kw rated generator sets [2/] shall be in accordance with MIL-E-11276 as specified for the 30-300 bhp size, as applicable, except the requirements specified therein for lifting eyes, instrumentation, manual engine control, and housing are not applicable to this specification."

2/ These are the EMU-20/E through -24/E generator sets. Id., p. 8, Table I.

Engine specification MIL-E-11276C provided specifically in section 3.8.14.1.2, "Storage batteries," that, "[u]nless otherwise specified 3/ the batteries shall be shipped charged and dry with one filling of electrolyte shipped with each battery" (ASBCA No. 14328, Resp. Ex. B-1).

Section 3.7.4, dealing with the cranking system, specified a system requiring heavy-rate discharge storage batteries (sec. 3.7.4.2b) and as to such batteries stated:

> "3.7.4.4 Storage batteries. Heavy-rate discharge storage batteries shall be provided. Twelve-volt batteries shall by type 6 TN or 8T conforming to MIL-B-11188. Twenty-four-volt batteries may be used and shall conform to MIL-B-6146."

Battery specification MIL-B-11188C (ASBCA No. 14328, Appt. Ex. A-4) assigned 6 TN and 8T batteries to class FE (id. Supp. 1) as to which it stated in section 3.4:

3/ Which was not the case here.

"Battery conditions. * * *
Class FE batteries shall be
furnished in one of the follow-
ing conditions as specified
(sec. 6.2):
(a) Charged and dry
(b) Charged and wet"

As to dry-charged batteries section 3.4.1 further provided peremptorily:

"No electrolyte shall be furnished."

2. Contract No. F04606-68-D-0575 (ASBCA No. 14328)

On 29 February 1968, seventeen months after award of Contract No. 0321, appellant was awarded an indefinite quantity contract for fixed minimum and optional maximum quantities of 60/50 cycle precise output diesel-engine-driven generator sets, known as MB-19 through MB-15 or "MBTeen" generator sets. They were to be furnished in accordance with technical exhibit SMNRTT 66-20 and specification MIL-G-26727C referred to in the technical exhibit. Preservation, packaging and packing were governed by Attachment 1 to AFLC Form No. 872 in a manner corresponding in all relevant respects to the provisions of Contract No. 0321,

as amended, and the contract also contained in GP-62 a provision on safety precautions for dangerous materials (see Contract No. 0321, GP-58, supra).

SMNRTT 66-20 listed in paragraph 3 numerous documents embodying its technical requirements including specification MIL-G-26727C, and provided in paragraph 4 that the generators to be furnished under the contract should in case of conflict meet in order of precedence the requirements of (1) the contract document; (2) SMNRTT 66-20; (3) the engineering date package; (4) MIL-G-26727C [the MBTeen generator specification]; and (5) the bailed articles.

As regards electrolyte, SMNRTT 66-20 was barren of any reference. MIL-G-26727C, though generally resembling MIL-G-38441 in its structure, differed in various respects from the latter specifications in regard to the wording of comparable provisions. It did not contain in the general engine requirements section (R4 doc. A(4), sec. 3.10) any reference to the engine specification (MIL-E-11276). The cranking system requirements section (id. sec. 3.10.4), limiting storage batteries to types 6TN and 8T of MIL-B-11188, now provided

expressly that batteries be furnished dry charged (id. sec. 3.10.4.4) but did not refer to the furnishing of electrolyte. It incorporated, however, in section 5, covering the requirements for preservation, packaging and packing, the same provisions on packaging and packing electrolyte and furnishing storage batteries dry charged (id. sec. 5.4.1.1, 5.4.1.1.2) which were found in MIL-G-38441 and heretofore set out.

MIL-G-26727C also included, however, the previously-cited engine and battery specifications among the applicable specification references (id., sec. 2). Their provisions were unchanged from those cited in respect of the 1966 Contract No. 0321. However, under Contract No. 0575 appellant received bailed articles, i.e., MBTeen generators the configuration of which was part of the technical contract requirements (SMNRTT 66-20, par. 4, R4 doc. A). The contracting officer found in his final decision (R4 doc. B-6) that these model generators were sent to appellant with electrolyte separately packed. No evidence was adduced at the hearing to contradict this finding.

3. Appellant's Performance

No units were delivered under the EMU contract of 1966 (No. 0321) until

22 November 1968. At that time, when the 1967 version of Attachment 1 to AFLC Form No. 872 had been inserted into Contract No. 0321, appellant began the shipment of 37 EMU generators on an expedited basis (ASBCA No. 14416, Tr. 7, 18-19); it completed these shipments in April 1969 (Tr. 19). These generators were furnished with dry charged batteries in their engines and with separate packages of electrolyte (Tr. 9, 12) without apparent objection. The testimony in ASBCA No. 14416 as well as record comments of counsel (id., Tr. 204) indicate that appellant may have considered the new Attachment No. 1, added in October 1968, as a contract change requiring it to furnish electrolyte with each generator (see R4 doc. B-1). No other units were delivered under Contract No. 0321 until after June 1969, at which time appellant had been directed to furnish electrolyte with each EMU generator (id., R4 doc. B-2) and subsequent deliveries of EMU generators were accompanied by packages of electrolyte (see id., Tr. 15).

The first MBTeen generators were not ready for delivery until the Spring of

1969. The dispute now before the Board then arose when appellant offered the first MBTeen generators for inspection at its plant by the Defense Contract Administration Services Office (DCASO), Bridgeport, Conn., and delivery to respondent without electrolyte (ASBCA No. 14328, Tr. 11). Thereafter, on 2 May 1969 the contracting officer at SMAMA telegraphically advised appellant that MIL-G-26727C specified the requirements for storage batteries and referred to section 5.4.1.1.1 as requiring electrolyte to be furnished and to Attachment No. 1 as detailed packaging and packing. Appellant's present contract manager testified that appellant interpreted the telegram as meaning that the Government wanted electrolyte to be shipped with each MBTeen generator (ASBCA No. 14328, Tr. 12). Appellant's project engineer was thereupon asked by his superiors to study the matter and decided that MIL-G-26727C did not specify applicable quantities of electrolyte to be furnished and that the battery specifications provided against it (Tr. 41-45). Accordingly, appellant replied on 26 May 1969 that appellant did not believe that it was

required to furnish electrolyte and had not included such cost in its bid since it was referred to only in the packaging portions of the specifications (ASBCA No. 14328, R4 doc. B-2) Apparently, the project engineer did not consider the applicability of the engine specifications.

Nevertheless, appellant early in May 1969 shipped the first MBTeen generator without electrolyte (ASBCA No. 14328, Tr. 17) and submitted on or about 21 May 1969 a technical packing order (TPO), as required by its contract, which did not provide for the packaging and packing of electrolyte (See ASBCA No. 14328, App. Ex. A-5). This TPO was approved by the Government on 21 June 1969 and the delivery of electrolyte waived for the first shipment of MBTeen generators (Tr. 17). After extensive correspondence the SMAMA contracting officer on 17 June 1969 directed appellant to furnish electrolyte with each MBTeen generator (id., R4 doc. B-10) and on 25 June 1969 issued his final decision confirming his prior directive (id., R4 doc. C). Thereafter appellant amended its TPO's to show packaging and packing of electrolyte

(see id., Appt. Ex. A-5) and all but the first MBTeen generators were so shipped (id., Tr. 14, 17).

Formal action under Contract No. 0321 for the EMU generators was delayed until mid-July and early August 1969 (ASBCA No. 14416, R4 docs. B-2, C) and all EMU generators were furnished with electrolyte.

4. Prior and Subsequent Generator Procurements

The EMU generator contract No. 0321 was the first and only such contract let by SMAMA (ASBCA No. 14416, Tr. 18).

On the other hand, appellant's MBTeen generator contract was one in a series of such SMAMA procurements. The original MBTeen Contract AF04(606)-7880 (Tr. 63) had been awarded to appellant in 1961 as a result of a two-step procurement. Under that contract appellant was not required to furnish electrolyte. In 1964, RFP No. 64-45018 was issued to appellant and other potential MBTeen generator suppliers. In that proposed contract Attachment 1 to AFLC Form No. 872 required the packaging of electrolyte "if furnished." Prior to the submission of bids one of the prospective contractors (neither

appellant nor the awardee) inquired whether the furnishing of electrolyte was required. In response to the inquiry, the RFP was amended by inserting in the basic technical exhibit the statement that electrolyte was to be furnished for each battery (ASBCA No. 14328, Resp. Ex. B-2). This RFP amendment was furnished at the time to appellant (id., Tr. 70) but the contract (No. AF04(606)-12917) was awarded to Bogue Electric Company on 18 August 1964. In December 1965 a further contract for MBTeen generators was let to Federal Electric Company which required in Attachment No. 1 the packaging of electrolyte "if furnished". Electrolyte was furnished without question. In August 1966, just prior to letting of the EMU generator contract, a contract for MBTeen generators was let to A. G. Schoowmaker Co., Inc. (No. F04606-67-0055) which also stated in Attachment 1 that electrolyte, "if furnished," was to be packaged in accordance with MIL-S-207 (ASBCA No. 14328, Resp. ltr, dtd 27 Jan 1970, Atch. 7). Under this contract electrolyte was not furnished. The words "if furnished" do not, of course, appear in Attachment 1 to the instant contracts.

At the present time, MBTeen generators are procured by the Defense Supply Agency for the military services. Appellant has introduced in evidence (ASBCA No. 14328, Appt. Ex. A-2, A-3) one 1970 contract for the procurement of 5 kw generators under a specification of the Navy's Facilities Engineering Command which did not require electrolyte to be furnished. This appears to be an EMU rather than a MBTeen type unit. This procurement cannot, however, be taken to show that DSA would presently procure either type of unit for the Air Force without electrolyte whatever may be the Navy's practice.

DECISION

I

It is the Government's position in respect of both appeals that in the first place the references in the specifications to the packaging of electrolyte require, and are understood by responsible bidders to require, that electrolyte be furnished.

Respondent emphasizes that without electrolyte for the batteries the generator would not be an operable unit and that appellant was to furnish complete operable units. It concedes, however, that water, gasoline and lub-

ricating oil need not be furnished by appellant though equally necessary to the running of a generator. It insistently attempts to distinguish these items from electrolyte as "consumables" as if such action - contractual classification could resolve the dispute of the parties.

Respondent insists, moreover, that the referenced engine specification is determinative of the issue and that the seemingly contrary battery specification applies only to the procurement of batteries as such.

Finally it asserts that, if appellant considered the specifications ambiguous, the ambiguity was patent and of sufficient importance to require inquiry and that appellant, having failed to inquire, must bear the cost of compliance with the only reasonable meaning of the specifications, which is that asserted by the Government.

Respondent additionally argues in regard to the EMU contract (ASBCA No. 14416) that appellant's delivery of electrolyte for the first 37 generators was a construction of the contract by conduct of the parties

which bound appellant to the same course in respect of all other units delivered under that contract.

Appellant, on the other hand, has claimed that the contract clearly and unambiguously provides that appellant need not furnish electrolyte. In its view the specification provisions, relied on by respondent, do not require it, especially in the light of the prior procurement background and of the circumstances of the present contracts. In particular, appellant contends that it was aware of the RFP amendment under the Bogue Electric contract (ASBCA No. 14328, Resp. Ex. B-2) and was entitled to rely on the absence of the amendatory language in the instant contracts as indicating that electrolyte was not required.

It was reinforced in that conclusion by the provision of the referenced battery specification that electrolyte should not be furnished. In appellant's argument that specification rather than the generator specification cited in the contracts and technical exhibits tends to become the "basic" specification (see App. Br. p. 18).

Assuming the specification to contain an ambiguity, appellant, relying on WPC Enterprises, Inc. v. United States, 163 Ct. Cl. 1(1963), also argues that the situation was one in which inquiry from the Government about the meaning of the specifications was not required.

In regard to Contract No. 0321 appellant - in the alternative - acknowledges an obligation to furnish electrolyte under the revised version of Attachment 1, introduced into the contract as a change by Modification P013 on 9 October 1968,

II

In light of the history of SMAMA's MBTeen generator procurements and with particular reference to the events preceding the contract award to Bogue Electric Company it is difficult to understand why SMAMA failed thereafter to specify in each technical exhibit whether electrolyte was to be furnished or why the Air Force failed to provide specifically for or against the furnishing of electrolyte in the generator specifications. Had the responsible procuring activity done so, this litigation would have been avoided.

We are forced, however, to take these appeals as we find them. In this light we cannot agree with either party that the generator specifications read alone or (in the case of Contract No. 0575) together with the packaging specifications (Attachment 1 to AFLC Form No. 872) clearly either provided or failed to provide for the furnishing of electrolyte.

The decisions cited by respondent do not support its position. The instant appeals do not involve erroneous description as in Crowder & Son Construction Co., ASBCA No. 8895, 1963 BCA par. 3744 or a misunderstanding of part of the contract drawings or specifications which, reasonably considered, required the disputed work. See Lyburn Construction Co., ASBCA Nos. 8758, 8763, 1963 BCA par. 3841; F. D. Rich Company, Inc., ASBCA No. 12193, 68-1 BCA par. 6920. Nor can it be said that a generator furnished without electrolyte is "incomplete" as was the electrical system in Marshal E. Ledford, ASBCA No. 9036, 1963 BCA par. 3957 without the 200 ampere line. Hence, we there deemed construction of the line an implied contract requirement for

a complete system. Here to the contrary, in a number of generator procurements preceding appellant's contracts and brought to the Board's attention on the record, procuring activities, including SMAMA, have accepted comparable or like generators without electrolyte as "complete" sets. In this regard neither party has argued that the prior MBTeen generator procurement experience was irrelevant or immaterial to appellant's understanding of the original EMU contract specifications and the record supports the conclusion their views in this regard are correct. Nor is there a valid distinction between battery acid (electrolyte) and water, gasoline or lubricating oil, all of which are equally needed to set or keep the generator in motion. For the assumed classification of the latter as "consumables" furnishes no valid basis on which the one must be, but the others need not be, furnished with the generator.

On the other hand, we cannot agree that the references to the packaging and packing of electrolyte in the generator specifications and (in the case of Contract No. 0575) in Attachment 1 are to be disregarded. These references raise on their face the question

whether electrolyte is to be furnished even though they may not be clear enough to establish beyond doubt a firm contract requirement therefor. The facts in Florida Builders, Inc., ASBCA No. 8592, 1963 BCA par. 3901 and in Liles Construction Company, Inc., ASBCA No. 2767, 70-1 BCA par. 8333 as to the nature of the contractual references to be considered in resolution of the dispute, are sufficiently different from those here to make these decisions inapplicable.

In these circumstances appellant's argument that it was entitled to rely on the absence of the amendatory language in the RFP for the Bogue contract as negating any duty to furnish electrolyte is at first glance appealing. But on further consideration it appears fallacious. For appellant, as the record shows, was also aware of the fact that SMAMA had no consistent policy or practice in demanding that electrolyte be furnished with MBTeen generators and that SMAMA action under one contract could not, as appellant thus knew or should have known, give rise to any inference that electrolyte was not required to be furnished. Cf. W.G. Cornell Co. v. United States, 179 Ct. Cl. 651, 667 (1967) Moreover,

under Contract No. 0575 it knew that its product had to meet the requirements of the sample articles and took the risk that they might be furnished with electrolyte since earlier generators had been so furnished to the Government. This unresolved and obvious uncertainty also strongly militates against the conclusion that mere omission of the electrolyte requirement in IFB's or RFP's subsequent to the Bogue contract amounts to its deletion.

The foregoing considerations lead us to conclude that the generator specifications, read alone or with Attachment 1, were inherently ambiguous. They emphasized the packaging and packing of electrolyte without ever requiring it to be furnished and the background of prior procurements, sometimes requiring and sometimes not requiring electrolyte to be furnished, only served to underline and preserve the ambiguity rather than to resolve it.

III

Both parties have pointed to referenced specifications as resolving the ambiguity which has been noted. Appellant, possibly

then unaware of the provisions of the engine specification,[4] consulted only the battery specification and decided that the specification resolved the question in its favor. But this proposition is contradicted by the countervailing reference to the engine specification which, as respondent correctly points out, required electrolyte to be furnished in a separate package. As the record shows, reference to both of these specifications did not impose upon appellant an incongruous burden of search. It was apparently aware of the existence of the battery specification and the engine specification was in both generator specifications immediately next in the list of references. None of the others would seem to bear on this issue. Hence, Gorn Corporation v. United States, Ct. Cl. No. 326-68 (decided 17 April 1970), has no application. See also, citing Gorn, Edward R. Marden Corp., ASBCA No. 13728, 71-1 BCA par. 8838.

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[4] If it was, this would be immaterial. HRH Construction Corp. v. United States, 192 Ct. Cl. 912 (1970).

Perhaps, if this matter came before us without its past procurement background and the involvement of both SMAMA and appellant in the prior MBTeen procurements, the Board might reasonably have concluded that the engine specifications should prevail. For in case of express conflict between the detail specifications, that for the more complex generator component (the engine), which includes the subordinate component (the battery), should logically govern rather than the specification applicable to the procurement of the subordinate component by itself. As between the two, it is engines rather than batteries which are being furnished. Moreover, this view appears preferable in that it gives meaning to the generator specification provisions on the packaging of electrolyte.

We hesitate to place our decision firmly on this ground only because it is apparent from the entire record that respondent, acting through SMAMA, has not in the past acted in accordance with this construction of the specifications in determining that electrolyte was to be furnished. In the light of SMAMA's past conduct, known to appellant, it is questionable whether

the appeal should be decided solely on this ground. But clearly the conflict between the two reference specifications created by itself an obvious ambiguity which could not escape a potential contractor familiar with the generators and which reinforced the patent ambiguity as to electrolyte in the generator specifications.

IV

We then reach what appears to us the correct basis for decision: that the specifications were patently ambiguous; that appellant was in fact or, if not, should have been, aware of this ambiguity; that it should have inquired whether the Government wanted electrolyte to be furnished with the generators; and that the construction of the specifications, adopted by appellant without inquiry, was an unreasonable one in the light of the entire record, including its participation in and knowledge of past MBTeen generator procurements. Jamsar, Inc. v. United States, Ct. Cl. No. 205-68 (decided 14 May 1971); Beacon Construction Co. v. United States, 161 Ct. Cl. 1 (1963); WPC Enterprises, Inc. v. United States 163 Ct. Cl. 1, 6-7 (1963); Mountain

Home Contractors v. United States, 192 Ct. Cl. 16, 20-22 (1970); ITT Kellogg, ASBCA No. 9580, 65-1 BCA par. 4675, m. f. recon. den. 65-2 BCA par. 5077; Truesdale Construction Co., ASBCA No. 11601, 66-2 BCA par. 5931; Boland Machine and Manufacturing Co., Inc., ASBCA No. 13664, 70-2 BCA par. 8556; A. M. Turner Company, ASBCA Nos. 13384 and 14047, 71-1 BCA par. 8648; Inflated Products Co., Inc., ASBCA No. 15083, 71-1 BCA par. 8861; W. L. Spruill & Co., Inc., ASBCA No. 14390, 71-1 BCA par.

The record here leaves no doubt that the ambiguity in the specifications, which we are called upon to resolve, was not one of those subtle or minor matters which a contractor cannot fairly be expected to notice or which he may reasonably resolve on his own without prebid inquiry. Mountain Home Contractors, WPC Enterprises, Inc., both supra. On the contrary it was patent, and required little scrutiny of specifications by appellant to whom it was known as such from prior procurements. As the record makes clear, it also was a matter recognized as an important matter by knowledgeable potential contractors. Hence, a major test

of the existence of a duty to inquire before bid is met. Pathman Construction Co., m. for recon. granted, ASBCA No. 13911, 70-2 BCA par. 8557.

In these circumstances, of all of which it was aware, appellant could proceed without seeking prebid clarification from the Government only at its own risk. If the position adopted by it was not a reasonable one - not within the "zone of reasonableness," WPC Enterprises, Inc., loc. cit., supra, at 6 - then appellant cannot prevail. Here appellant was or should have been aware of the fact (i) that the Government under substantially like specifications had required electrolyte to be furnished; (ii) that the specifications repeatedly referred to the packaging of electrolyte; (iii) that at least the referenced engine specification expressly required it; and that (iv) the referenced engine and battery specifications were in apparent, glaring conflict.

In these circumstances it was unreasonable for appellant to take the view that the contracts did not require the furnishing of electrolyte and that, as its counsel puts it (App. Br., p.3), "each specifically provides" that appellant was not required

to furnish electrolyte. Altogether, too many texts and events pointed in the opposite direction for such interpretation to be reasonable. But if appellant was in doubt, as it should have been, and was unwilling to adopt the opposite conclusion, i.e. that it was being called upon to furnish electrolyte, there was a simple solution to its dilemma: inquiry to the contracting officer which, we cannot but assume, would have produced an answer as it did in the procurement that was awarded to Bogue Electric Company.

In consequence, appellant's position cannot be sustained and its claims were properly rejected.

V

While our conclusion applies equally to Appeals ASBCA Nos. 14328 and 14416, the facts of the latter are not entirely "on all fours" with those of the former and merit briefly separate consideration.

In addition to the arguments advanced in respect to both appeals appellant contends that the substitution of the revised Attachment 1, referring to the packaging of electroltye, for the original Attachment 1 which did not do so,

amounted to a compensable change in that the furnishing of electrolyte was now required where previously it had not been.

The argument cannot carry any weight for the EMU generator specification contained from the start a provision regarding packaging of electrolyte as well as the references to the conflicting battery and engine specifications. But, if we were to give weight to appellant's argument, it would lead to the further conclusion that the MBTeen generator contract from the start required the furnishing of electrolyte since Attachment 1, as incorporated therein, was identical in content with the revised Attachment No. 1 incorporated into the EMU generator contract by Contract Modification No. P013.

VI

Both parties have developed further variations upon the themes previously considered. It is in our view unnecessary to advert to them. For the reasons stated the contracting officer's decisions are found to have reached the correct result and the appeals

therefrom are, therefore, denied.

Dated 5 August 1971.

RUDOLF SOBERNHEIM
Member of Division No. 8,
Armed Services Board of
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I concur

WILLIAM J. RUBERRY
Member of Division No. 8,
Armed Services Board of
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I concur

RICHARD C. SOLIBAKKE, Chairman,
Armed Services Board of Contract
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I concur

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